The Aerospace Corporation and Aerospace Professional Staff Association. Case 31–CA–19441

June 24, 1994

DECISION AND ORDER

By Members Stephens, Devaney, and Browning

On November 17, 1993, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Aerospace Corporation, El Segundo, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Gary Freelen Ellison, Esq., for the General Counsel.

James M. Adler, Esq. (Irell and Manella), of Los Angeles,
California, for the Respondent.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on the unfair labor practice charge in the above-captioned matter, which was filed on June 29, 1992, by the Aerospace Professional Staff Association (APSA) on August 13, 1992, the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint alleging that The Aerospace Corporation (Respondent) had engaged in, and is engaging in, acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. As scheduled, the matter came to trial before me in Los Angeles, California, on February 18, 1993. At the trial, all parties were given the opportunity to examine and cross-examine all witnesses, to offer into the record any relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent, and such have been carefully considered. Accordingly, based on the entire record here, including my observation of the

testimonial demeanor of the several witnesses and the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a State of California corporation, with an office and principal place of business located in El Segundo, California, is engaged in the business of providing research and development services to the United States Air Force. In the course and conduct of the business operations, Respondent annually purchases and receives goods and services, valued in excess of \$50,000, directly from suppliers located outside the State of California; provides research and development services for the United States Government, valued in excess of \$1 million; and has a substantial impact on the national defense of the United States. Respondent admits that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that APSA is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUE

The complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act by failing and refusing to furnish to APSA ladder position, matrix, salary, and raise information, which had been requested by APSA and which is necessary and relevant to the processing of a grievance, by APSA on behalf of a bargaining unit employee, against Respondent. Contrary to the General Counsel, Respondent argues that certain of the requested information, while arguably relevant to the processing of the grievance, implicates important privacy concerns, requiring the parties to engage in good-faith bargaining regarding the requested material and that, as APSA has refused to bargain to impasse with respect to the furnishing of all the requested data, the instant unfair labor practice charge is premature. With regard to the requested wage and raise information, Respondent asserts that it has not engaged in any unlawful conduct inasmuch as said information had previously been provided to APSA in a different form.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The record¹ establishes that Respondent is a "general systems engineering and integration" contractor, working with that portion of the United States Air Force responsible for the acquisition of satellites for the Department of Defense and that at least 95 percent of Respondent's work is of a classified nature. The record further establishes that, since 1974, Respondent has recognized APSA as the collective-bargaining representative of its technical staff, comprised of nonsupervisory MTS levels I, II, and III employees, with such recognition embodied in successive collective-bargaining agreements, with the most recent of which effective from

¹We note that no exceptions have been filed to the judge's recommendation that the complaint allegation that the Respondent unlawfully failed to provide the Union with requested salary and raise information be dismissed.

¹ There is no dispute as to the facts here.

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August 1, 1990, through July 31, 1992, and extended until December 16, 1992, and that there are approximately 1800 bargaining unit employees, with all having bachelor degrees and most having advanced masters or doctorate degrees. Shirley McCarty is the general manager of Respondent's human resources department; beneath her, in Respondent's supervisorial hierarchy, are Bonnie Kent, who is in charge of the employee relations and services department, and Roman Gallego, who, since December 1992, has been Respondent's labor relations administrator. Theodore Little, a technical staff employee for Respondent, is the first vice president of APSA and Bruce Campbell is the negotiations chairman.

The record discloses that the genesis of the instant dispute between Respondent and APSA and of the consequent unfair labor practice allegations was a contractual grievance, filed by Stan Hansen, a technical staff employee in Respondent's strategic defense operations division, on December 21, 1991. In his grievance, Hansen, who possesses an advanced doctorate degree, asserted that his 1991 performance review, which resulted in the denial of an annual salary increase, was "unfair." Subsequently, after Hansen met separately with Bonnie Kent and W. M. Mann, the vice president of the strategic defense operations division, in unsuccessful efforts to resolve the grievance, APSA officials and Hansen decided to further pursue the grievance and, according to Theodore Little, "felt that more data was needed in order to be able to evaluate and investigate the grievance." Accordingly, Warner Lee, APSA's grievance chairman, wrote to Bonnie Kent, on March 23, 1992, requesting "a hearing of his grievance at the Group Vice President level" and noting that APSA was unable to evaluate the merits of Hansen's contentions "without knowing what his . . . matrix means in relation to the rest of the division and the company." A hearing date was scheduled for April 23, and, on April 13, in accord with what Lee stated in his above-quoted letter, Theodore Little wrote a letter to Shirley McCarty, requesting the following information in order that APSA could "intelligently, rationally and properly evaluate, process and pursue' Hansen's grievance—"Ladder position, matrix, salary and raise data for every bargaining unit member in Strategic Defense Operations for 1990 and 1991." Little added that "social security numbers or other code may be used to protect the identity of individuals.'

As it desired time in which to respond to APSA's information request, Respondent canceled the grievance hearing, and, on May 5, Bonnie Kent responded, by letter, to Little. Regarding the requested salary and raise information, she wrote that "APSA already receives [such] information broken down by division in addition to other data for every Bargaining Unit member. You have in your possession the reports from 1990 and 1991."3 As to the ladder rankings, Kent stated that Hansen's rank was "at the bottom" and that "we are prepare[d] to give you ladder and matrix information for the bottom six lowest ranked members of the division so that you will be able to conduct your own evaluation." Kent concluded her letter by offering to work with Little in order to resolve the matter. With regard to Respondent's counteroffer, Shirley McCarty, who signed the letter for Kent, testified that, in formulating its response, Respondent balanced the privacy rights of its employees4 against APSA's need to have enough information to establish "consistency" in Respondent's employee review process and that, inasmuch as the collective-bargaining agreement mandated that Respondent provide such on a quarterly basis, APSA already pos-

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The company will provide to APSA on request . . . such data as is necessary and reasonable to permit APSA to fulfill its responsibilities as the bargaining agent for the employees covered by this agreement. Data to be provided hereunder shall include social security number, without names, for each member of the bargaining unit, salary and salary review date, amount of increase, date of hire, position code, years of experience, date and type of highest degree, the average dollar amount per employee distributed each quarter, and cost center code . . . by first two digits only. Such data shall be provided for all bargaining unit employees . . . for each three-(3)-month period.

According to Shirley McCarty, the purpose of using social security numbers rather than names is to "protect the privacy of the individuals."

⁴The record establishes that some of Respondent's employees are concerned about guarding their privacy and that both Respondent and APSA have recognized this. Thus, according to Bonnie Kent, Respondent employs "a lot of people who don't want anything divulged about them. They won't even tell us their home address.' Also, in 1990, APSA filed a grievance over a reduction in force. On that occasion, Respondent gave information, identifying employees by name rather than by code, to APSA. However, Respondent required each employee to execute a release, and two employees refused. Moreover, Respondent protects employee privacy by stamping all personnel record jackets with a privacy label and maintaining a published personnel "practice," protecting the contents of personnel folders from all but "authorized requesters" and establishing for the transfer of files and the accountability for them. Further, as stated above, while, by contract, APSA receives salary and raise data, employees are identified only by social security numbers. Finally, Theodore Little acknowledged that APSA has likewise long recognized the "sensitivity" of personnel data and, in this regard, I note that APSA offered to permit Respondent to provide the requested information with the employees identified by social security numbers or some sort of code and that, pursuant to the investigation of past grievances, Respondent has given performance review information to APSA.

With regard to the above-noted personnel "practice," it is unclear in the record whether the policy has ever been disseminated to the technical staff employees. Also, there is no record evidence as to whether Respondent has ever given assurances to its technical staff employees that performance review information would be maintained as confidential information. In this regard, I note the uncontroverted testimony of Little that, in processing past grievances, APSA officials have been given access to performance review information. There is no record evidence whether, in such instances, Respondent required employees to execute releases.

² The record establishes that Respondent gives each technical staff employee a yearly performance review, upon which Respondent mainly relies in determining whether the employee will receive a yearly salary increase and that the performance review consists of written comments by his immediate supervisor; the completion, by the employee's immediate supervisor, of a so-called "matrix" form, consisting of 16 employment attributes, including quantity and quality of work, timeliness, versatility, communicative skills, and responsibility, for each of which the supervisor gives a ranking of from zero to five for the employee; and the "ladder" ranking of the employee. The latter is a "recent innovation" by which Respondent gives a numerical ranking to each employee in a department. Thus, in the strategic defense operations department, to which 50 technical staff employees are assigned, Respondent ranked Stan Hansen at number 50, making him the lowest rated technical staff employee in his department.

 $^{^3\,\}mathrm{Par.}\ 1505$ of the parties' most recent collective-bargaining agreement states that:

sessed the requested salary and raise data. In this regard, when asked if APSA would have needed more salary information if Respondent provided the requested ladder and matrix information, Little conceded "in general, no."

Clearly, APSA believed that Respondent's offer was insufficient. Thus, on May 11, Little wrote a letter to McCarty, stating that Kent's May 5 response was "unacceptable" and renewed APSA's April 13 information request "so that APSA can intelligently, rationally and properly evaluate, process and pursue the [Hansen grievance]." By letter, Shirley McCarty immediately responded the next day. She stated that, while Respondent is charged with protecting the privacy of all employees, "so that you may evaluate Mr. Hansen's position within his division, we are prepared to provide you with the matrices and a code for the seven individuals above Mr. Hansen on the performance ladder. Together with the salary information you received earlier, we believe this will allow you to conduct your evaluation." Apparently, McCarty hand delivered her above-quoted response letter to Little in her office and reiterated Respondent's position that APSA did not require any more data beyond what had previously been offered and what was added that day. To this, Little repeated that the requested information was needed to permit APSA to evaluate and investigate Hansen's grievance⁵ and that APSA wanted "all of the data or they didn't want any of it."

Bonnie Kent testified that, prior to and subsequent to the foregoing exchange of letters, she frequently spoke to Little with regard to APSA's information request and that Little continually refused Respondent's limited compromise responses, saying "[W]e want all the information." Asked if Little ever explained why APSA needed the ladder and matrix information for all of the technical staff employees in the strategic defense operations division, Kent testified that "he did say to evaluate the grievance. . . . We need it to process and evaluate the grievance." She added that she always disagreed with Little on this point, telling him that since Hansen was at the bottom of the ladder rankings, the requested information would be worthless to APSA. With regard to the salary and raise information, according to Kent, she explained to Little that providing such to APSA was unnecessary as it already had the data for the past 2 years, and Little's response was that what APSA had was "cumbersome" and 'difficult to assimilate.'

The record establishes that, subsequent to the exchange of the above-quoted letters, APSA neither deviated from its stated information demand nor accepted Respondent's compromise offers for resolving the matter and that, notwith-standing its proposals to furnish some, Respondent provided none of the requested information. With matters in that posture, APSA filed the instant unfair labor practice charge on June 29, 1992. Approximately 3 weeks later, on July 24, Theodore Little and Bruce Campbell met with McCarty and Kent in McCarty's conference room to once again discuss the information request. There is no dispute that the APSA representatives continued to demand the salary and raise in-

formation for 1990 and 1991 and the 1990 and 1991 ladder rankings and matrices for each of the technical staff employees in the strategic defense operations division. After McCarty repeated Respondent's position that it did not believe that APSA needed all the requested material for Hansen's grievance, Little reiterated that APSA continued to require all of the requested material and that such was necessary to investigate and evaluate the grievance, and Campbell added that the data was needed "for the purpose of looking at the consistency of the data and for dramatic changes." McCarty, who admitted understanding that APSA questioned the consistency of ladder rankings and matrices, replied that she had examined the material and it was consistent and that she believed Respondent's offer was sufficient for APSA to see that there had been consistency and that Hansen's performance review was "reasonable." McCarty added that it was difficult for Respondent to retrieve and collate all the requested material; that "the concern is that information when it gets out into hands that can correlate information, get names, possibly identify people, especially when you're talking about one . . . division"; and that Respondent's concerns were "privacy" as well as possible "embarrassment" and "morale" problems.6 The record establishes that the meeting ended with each party adamantly adhering to its premeeting position and that none of the requested material was transmitted to APSA.

The Regional Director for Region 31 issued the instant complaint on August 13, 1992, and 11 days later, in a letter dated August 24, in order "to reach a satisfactory accommodation" with regard to APSA's information request, McCarty made another compromise proposal to Little. With regard to the requested salary and raise information, McCarty reiterated that such "is already in your possession having been provided to you . . . in accordance with our collective bargaining agreement" but proposed to "replace" copies of said material which had been lost or mislaid. As to the ladder placement and matrix information, after restating Respondent's position that APSA had never "successfully explained . . . why it is necessary to secure ladder ranking and matrix information for every bargaining unit employee in the Operation" and that "verification of the fairness of [Hansen's] treatment can be achieved by examining a limited number of employees immediately above him on the ladder," McCarty proposed "providing you with the ladder rankings and matrices of up to 25 nonsupervisory [technical staff employees] in Strategic Defense Operations." She added that APSA could "designate the 25 positions immediately above Stan Hansen or you may designate up to 25 persons by ladder position in order to ensure a fair sampling.

⁵ While testifying, Little explained that APSA had received information that Respondent's ladder rankings of technical staff employees was inconsistent with the matrices and that this 'lack of consistency' was the basis for APSA's request for ladder rankings and matrices for all of the technical staff employees in the strategic defense operations division.

⁶McCarty stated that APSA shared Respondent's privacy concerns and, during cross-examination, stated that she understood APSA's policy was that only selected APSA officials are permitted to view confidential materials and that APSA gave no indication that such would not be the policy with regard to the requested material. During her cross-examination, Bonnie Kent conceded that she has no knowledge that APSA shares confidential information with bargaining unit personnel and that, while stating Respondent has had past problems with disclosures by some APSA officials, "Ted is very, very good about that." Finally, as stated above, Little testified, without contradiction, that, in processing past grievances, APSA officials have been given employee performance review information by Respondent.

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If, after receiving the 25 matrices and ladder rankings, you still believe additional information to be necessary, we will both be in a better position to discuss the matter." There is no question that Little, on behalf of APSA, rejected Respondent's compromise proposal—"I'm sure I responded and said we needed all of the data."8 Asked why, Little reiterated that APSA believed the ladder rankings and matrices "data was inconsistent" for 1990 and 1991 and wanted to ascertain if such was true for just "some" or the "majority of the people," and, specifically as to the Hansen grievance, he stated that any inconsistency "would imply that the thing was not being approached in a very careful, reasoning fashion' and that Hansen's evaluation "may have been a willynilly performance review that was given him for some reason that we're not aware of." Finally, there is no dispute that, as of the date of the instant trial, Respondent had provided none of the requested 1990 and 1991 salary and raise or ladder ranking or matrix information for the strategic defense operations division employees to APSA.

B. Legal Analysis

As to whether Respondent's refusal to provide the requested 1990 and 1991 salary and raise and ladder ranking and matrix information for all technical staff employees in the strategic defense operations division to APSA constituted a violation of Section 8(a)(1) and (5) of the Act, there is no dispute as to the applicable legal principles. Thus, it has long been established that, generally, an employer is under a statutory obligation to, upon request, provide a labor organization, which is the collective-bargaining representative of the employer's employees, with information, which is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Howard University, 290 NLRB 1006 (1988). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for administration of a collective-bargaining agreement, including information required by the labor organization to process a grievance. Acme Industrial, supra; Bacardi Corp., 296 NLRB 1220 (1989); Howard University, supra. The standard for relevancy is a "liberal discovery-type standard," with the sought-after evidence having to be not necessarily dispositive of the issue between the parties but only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. Bacardi Corp., supra; Howard University, supra; Pfizer, Inc., 268 NLRB 916 (1984). Necessity is not a guideline in itself but rather is directly related to relevancy, and only the prob-

ability that the requested information will be of use to the labor organization need be established. Bacardi Corp., supra. Moreover, information, which concerns the terms and conditions of employment of the bargaining unit employees, is deemed "so intrinsic to the core of the employer-employee relationship" so as to be presumptively relevant. York International Corp., 290 NLRB 438 (1988), quoting Southwestern Bell Telephone Co., 173 NLRB 172 (1968); Buffalo Concrete, 276 NLRB 839 (1985). While the foregoing constitutes a general statement of the applicable legal principles, in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979), the Supreme Court "recognized a limited exception [to the duty to provide relevant information to a bargaining representative] for information that is confidential in nature." New Jersey Bell Telephone Co. v. NLRB, 720 F.2d 789, 791 (3d Cir. 1983). In such circumstances, where the employer has raised a "legitimate and substantial" claim of confidentiality, 10 "the Board is . . . required to balance the [labor organization's] need for the information against the legitimate confidentiality interest established by the employer." General Dynamics Corp., 268 NLRB 1432, 1433 (1984).11

Counsel for the General Counsel argues that the requested 1990 and 1991 salary and raise and ladder ranking and matrix information is presumptively relevant for the Stan Hansen grievance, and, in its defense to the allegations of the complaint that it acted unlawfully in refusing to provide the information to APSA, Respondent does not dispute the relevancy or necessity of the information for the grievance. Indeed, there can be no doubt of relevancy herein. Thus, not only did Theodore Little explain, on several occasions, to Respondent's officials that all the requested material was necessary for APSA to investigate and evaluate the merits of the Hansen grievance but also Bruce Campbell explained, and Shirley McCarty admittedly understood, that APSA was concerned about the consistency of the ladder rankings and matrices. Rather than lack of relevancy, Respondent's de-

⁷Asked, if, by increasing its compromise offer to 25 ladder rankings and matrices, Respondent's privacy concerns had been dispelled, McCarty said, "We wanted to balance the need of [APSA]... against the privacy; and we felt that that was a reasonable balance."

⁸ Asked why Respondent failed to act unilaterally by selecting 25 rankings and matrices and releasing said material to APSA, McCarty replied, "If it wasn't what they wanted, we didn't want to go the work of getting all that information together."

⁹Little testified that, to his knowledge, Hansen was the only strategic defense operations technical staff employee, who complained about his 1991 performance review.

¹⁰ An employer bears the burden of demonstrating that its refusal to provide relevant and necessary information to a labor organization is excusable because the requested data is privileged information. *McDonnell Douglas Corp.*, 224 NLRB 881 (1976).

¹¹ Counsel for Respondent argues that the Board now requires the parties initially must negotiate in good faith in an effort to resolve their differences prior to intervention by the Board in order to balance the employer's legitimate privacy interest against the labor organization's need for the information. Counsel cites four Board decisions (Minnesota Mining Co., 261 NLRB 27 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983); Borden Chemical, 261 NLRB 64 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983); Colgate-Palmolive Co., 261 NLRB 90 (1982), enfd. 711 F.2d (D.C. Cir. 1983); and Plough, Inc., 262 NLRB 1095 (1982)), as support for this argument. However, close scrutiny of these and related Board decisions establishes that, while the Board required bargaining in each prior to balancing the employer's privacy interests against the labor organization's need for the information, its orders were limited to assertedly confidential and proprietary trade secret information and were not more broadly worded. Indeed, in each of the cases, the Board engaged in an immediate balancing of the parties' respective interests over health and safety information and other data about which the employers raised no trade secret defense. In only one other case (General Dynamics, supra) did the Board require the parties to engage in bargaining prior to engaging in a balancing of interests, but the requirement therein was limited to bargaining over the conditions under which the material would be disclosed. Accordingly, I reject Respondent's argument as being without merit.

fense, for refusing to provide the requested ladder ranking and matrix information, involves the confidentiality of the requested information, with counsel asserting that the information sought by APSA is personnel file information "of a most sensitive nature" and, more specifically, that disclosure of the ladder ranking and matrix information to APSA "would cause substantial embarrassment to members of a bargaining unit which consists of a unique group of highly talented, highly paid, and individualistic professional employees who have always exhibited a particular sensitivity about privacy issues." In accord with the approach of the Board in such cases, prior to engaging in a balancing of the respective interests of Respondent and of APSA and even assuming there is validity to counsel for Respondent's argument regarding prior bargaining, my threshold inquiry must concern whether Respondent has met its burden of proof-establishing that its expressed concern for employee privacy and confidentiality is "legitimate and substantial." Detroit Edison, supra at 315. For the below-stated reasons, I find that Respondent has failed to meet its burden.

Initially, in Detroit Edison, the Supreme Court defined the nature of the privacy interest, at issue therein, as the "sensitivity" of any individual resulting from the "disclosure of information that may be taken to bear on his or her basic competence," and counsel for Respondent asserts that "there is no fundamental difference between the employee evaluations embodied in the matrices sought by APSA and the requested testing information at issue in Detroit Edison." The contention utterly subverts the meaning of the Supreme Court's decision. Thus, contrary to counsel, the Court was confronted with defining the privacy interests inherent in employee aptitude test scores, "which theoretically reveal intellectual capacity and psychological makeup" and "taken out of context . . . may threaten an individual's ego and sense of self-worth." Salt River Valley Water Users' Assn. v. NLRB, 769 F.2d 639, 642 (9th Cir. 1985). Moreover, as noted by the Supreme Court, psychologists, who administer such tests, consider them so "highly sensitive" that they are ethically bound not to reveal either the test scores or the actual tests to unauthorized persons, including management personnel. Detroit Edison, supra at 306-307; Salt River Assn., supra. In contrast, the performance matrices, requested by APSA, consist of a supervisor's rating of 16 of an employee's employment attributes (timeliness, versatility, communicative skills, quantity, and quality of work, etc.) and, as the record establishes, are confined to evaluations of Respondent's employees' on-the-job performance, something which can hardly be described as private and which may readily be observed by fellow employees. Also, the information, contained in the evaluation matrices, merely catalog a "garden variety" of common employment characteristics and "demonstrate the employee's level of success at his job, but [the information] does not attempt to provide an objective measure of his 'intelligence' or psychological fitness." Salt River Assn., supra; New Jersey Bell Telephone Co., 289 NLRB 318, 319 (1988).

Furthermore, there exists no record evidence that Respondent's employees have any expectation that their ladder rankings or matrices will remain confidential in the instant circumstances. Thus, unlike in *Detroit Edison*, supra, there is no record evidence that Respondent ever made any commitment, to its technical staff bargaining unit employees, to

maintain the confidentiality of their ladder rankings or matrices, and there is no record evidence that employees have sought to keep the information confidential or have any expectation of confidentiality in the normal processing of grievances. Illinois-American Water Co., 296 NLRB 715, 724 (1989); Salt River Valley Water Users' Assn., 272 NLRB 296 (1984), affd. 769 F.2d 639 (9th Cir. 1985); Pfizer, Inc., supra at 919. Indeed, the information, at issue herein, unlike the aptitude tests in *Detroit Edison* and like employment histories and disciplinary records, seems to be of the type frequently introduced in arbitration proceedings for the limited purpose of evaluating a bargaining unit employee's grievance, and the Board has recently found that an employer acted in violation of Section 8(a)(1) and (5) of the Act in refusing to provide performance appraisals to a labor organization. New York Telephone Co., 299 NLRB 351 (1990); Pfizer, Inc., supra.12 Also, while Respondent maintains a general personnel "practice," regarding the release, transfer, and accountability of personnel folders, its representatives do not seem to have been subject to any restraints regarding the confidentiality of the information, at issue herein. In this regard, I note that, on July 24, in expressing her opinion to Theodore Little and Bruce Campbell that Respondent's compromise offer was sufficient for APSA's purposes, Shirley McCarty stated that she had reviewed the requested material. As does the United States Court of Appeals for the Ninth Circuit, I believe it fundamentally unfair for Respondent to be able to rely on the "confidential" information for its own defense while, at the same time, denying the employees' bargaining representative access to the information. Salt River Assn., supra at 643. Finally, such must be contrasted with the absolute confidentiality, including from managerial scrutiny, of the aptitude test scores in Detroit Edison, supra.

Counsel for Respondent argues that the confidentiality of information contained in employees' personnel files has its sources in both state and Federal law. In this regard, in Detroit Edison, supra, the Supreme Court pointed out that "a person's interest in preserving the confidentiality of sensitive information contained in his personnel files has long been given forceful recognition in both Federal and state legislation" Id. at 318 fn. 16. Furthermore, as pointed out by counsel, the State of California Constitution recognizes privacy as an "inalienable right" and, with regard to personnel records, the California courts have generally "concluded that the public interest in preserving confidential information outweighs the interest of a private litigant in obtaining the confidential information." Harding Lawson Assoc. v. Superior Court, 12 Cal.Rptr. 2d 538, 539 (Cal.App 1 Dist. 1992). However, while counsel's statement of the law is correct, his argument begs the question—is the performance review in-

¹² Notwithstanding my view that employees should not reasonably expect that their performance reviews will be treated as entirely private, as has occurred in the past, some of Respondent's technical staff employees in the strategic defense operations division may complain about disclosure of such information in conjunction with the Hansen grievance. As has the Board in similar circumstances, I quote from *WCCO Radio v. NLRB*, 844 F.2d 511, 515 (8th Cir. 1988), that "one of the consequences of collective bargaining is that it subordinates the particular interests of individual employees to the collective interest of the unit. Hence, a preference for confidentiality on the part of some . . . employees does not nullify [the Union's] right to the information."

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formation, the ladder rankings and matrices, contained in Respondent's technical staff employees' personnel files inherently confidential in nature. I have concluded that such is not, and, accordingly, whatever privacy right may attach to 'sensitive' information, contained in employee personnel files, is not applicable in this instance. Counsel next points out that Respondent's technical staff bargaining unit is a "unique" group, comprised of highly talented, highly paid, and individualistic professional employees and that disclosure of the ladder rankings and matrices would cause them "substantial embarrassment." If counsel means to suggest that analysis of the confidentiality of said information is dependent upon the class of employees involved, he is, of course, utterly incorrect. In my view, whether an individual can be said to truly have a privacy interest in any material depends upon the nature of the material itself and not the individual. Thus, in *Detroit Edison*, analysis of the objective and inherent nature of the psychological aptitude tests themselves, together with the employer's promise of confidentiality, rather than analysis of the employees, who were given the tests, formed the basis of the Supreme Court's conclusion that the employer's concern for employee confidentiality was legitimate and substantial. If, instead, counsel means to suggest that all means must be undertaken to ensure against general disclosure of the job performance information, any potential risk of embarrassment to bargaining unit employees may be minimized by continuation of the parties' past practice of providing APSA with the requested information in coded form and identifying individuals only by social security numbers, and such shall be included in my recommended Order herein. Based on the foregoing, I conclude that Respondent has failed to meet its burden of proof of establishing a legitimate and substantial privacy concern in the requested 1990 and 1991 ladder and matrix information and that Respondent acted in violation of Section 8(a)(1) and (5) of the Act in failing to provide such information pursuant to APSA's request. Salt River Assn., supra; Howard University, supra; Pfizer, Inc., supra.

Turning to Respondent's failure and refusal to provide APSA with the requested 1990 and 1991 salary and raise information for the strategic defense operations division technical staff employees, counsel for Respondent, citing Emeryville Research Center v. NLRB, 441 F.2d 880 (9th Cir. 1971), and United Aircraft Corp., 192 NLRB 382 (1971), argues that, inasmuch as, pursuant to the existing collectivebargaining agreement, it provides to APSA salary and raise data for every bargaining unit employee on a quarterly basis and as, therefore, APSA already possesses the requested material, it was under no obligation to comply with APSA's request for such information in a different form than previously provided. Contrary to Respondent, counsel for the General Counsel, citing Illinois-American Water Co., supra, argues that, even though requested information is available to a labor organization through other sources, including its own records, an employer is not relieved of its bargaining obligation to supply the requested information to the labor organization in a convenient form. I find merit in Respondent's position. Initially, there is no dispute that Respondent provides salary and raise information for all bargaining unit employees to APSA on a quarterly basis. Further, while the requested salary and raise information was restricted to the technical staff employees in Respondent's strategic defense operations division, when asked if the labor organization would have required any more salary information if Respondent had provided the requested ladder rankings and matrices, Theodore Little conceded "in general, no." United Aircraft Corp., supra at 389, the Board stated that "an employer, if it is to fulfill its bargaining obligation under Section 8(a)(5) is required to furnish relevant information requested by the employee representative. But it does not follow that the union is entitled to such information in the exact form or on the exact terms requested." Similarly, the United States Court of Appeals for the Ninth Circuit, in Emeryville Research Center, supra at 884, ruled that there would not "be the slightest basis for an unfair labor practice charge where the company offers information in a form different from that demanded but which nonetheless meets every need stated by the Union," and, significantly, in Detroit Edison, supra at 318, the Supreme Court cited this decision as support for its conclusion that a labor organization's interests, however legitimate, do not always predominate over other interests. Moreover, Illinois-American Water Co., the decision relied upon by counsel for the General Counsel, appears to be inapposite. While the employers, in United Aircraft Corp. and in Emeryville Research Center, had provided, or offered to provide, requested information in a different form than demanded by the labor organizations, which represented their respective employees, the employer, in Illinois-American Water Co., refused to provide any requested information to the labor organization therein, asserting that the same information was available from other sources. Such, of course, is not the situation involved herein. In these circumstances, as Respondent has, concededly, previously provided the requested salary and raise information to APSA, albeit in a different form, the former has not engaged in conduct, violative of Section 8(a)(1) and (5) of the Act by refusing to provide the requested 1990 and 1991 salary and raise information to APSA, and I shall recommend dismissal of this aspect of the complaint allegations.

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. APSA is a labor organization within the meaning of Section 2(5) of the Act.
- 3. APSA is the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act of certain of Respondent's employees in the following appropriate unit: All regular employees employed by Respondent as non-supervisory MTS level I, level II, and level III at the following locations: El Segundo, Vandenberg Air Force Base, and Sunnyvale, California, Buckley Air Force Base, Colorado, Kennedy Space Center, Florida, Washington, D.C., Omaha, Nebraska, Houston, Texas, Kirkland Air Force Base, New Mexico, Falcon Air Force Base, Colorado, and Australia; excluding all other employees, confidential employees, clerical employees, guards, and supervisors as defined by the Act.
- 4. By failing and refusing to furnish to APSA, pursuant to its request in connection with the grievance filed by Stan Hansen, copies of the 1990 and 1991 ladder rankings and matrices for all bargaining unit employees in Respondent's strategic defense operations division, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

- 5. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
- 6. Unless set forth above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act, I shall order it to cease and desist and take certain affirmative action necessary to effectuate the purposes and policies of the Act. Specifically, inasmuch as Respondent has been found to have unlawfully failed and refused to furnish to APSA the requested 1990 and 1991 ladder rankings and matrices for all the bargaining unit employees in the strategic defense operations division, I shall recommend that Respondent be ordered, upon request, to furnish said information to APSA.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 13

ORDER

The Respondent, The Aerospace Corporation, El Segundo, California, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to furnish to APSA, pursuant to its request in connection with the grievance filed by Stan Hansen, copies of the 1990 and 1991 ladder rankings and matrices for all bargaining unit employees in Respondent's strategic defense operations division.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, furnish to APSA the 1990 and 1991 ladder rankings and matrices for all employees in Respondent's strategic defense operations division provided that, in accord with the parties' collective-bargaining agreement, past practice, and APSA's letter dated April 13, 1992, social security numbers or some other identification code is utilized in order to protect the identities of bargaining unit employees in the strategic defense operations division.
- (b) Post at its facilities in El Segundo, Sunnyvale, and Vandenberg Air Force Base, California, Buckley Air Force Base, Colorado, Kennedy Space Center, Florida, Washington, D.C., Omaha, Nebraska, Houston, Texas, Kirkland Air Force Base, New Mexico, Falcon Air Force Base, Colorado, and Australia, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Re-

gional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that, insofar as the complaint alleges that Respondent unlawfully failed and refused to furnish to APSA 1990 and 1991 salary and raise information, the complaint shall be, and is, dismissed.

National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Aerospace Professional Staff Association, as the collective bargaining representative of our nonsupervisory MTS level I, level II, and level III employees, by failing and refusing to furnish to Aerospace Professional Staff Association, pursuant to its request in connection with a grievance filed by Stan Hansen, copies of the 1990 and 1991 ladder rankings and matrices for all bargaining unit employees in our strategic defense operations division.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL, on request, furnish to Aerospace Professional Staff Association copies of the 1990 and 1991 ladder rankings and matrices for all bargaining unit employees in our strategic defense operations division, provided that, in accord with the existing collective-bargaining agreement, past practice, and Aerospace Professional Staff Association, request, social security numbers or some other code is utilized to protect the identities of the bargaining unit employees, whose performance review data has been given to Aerospace Professional Staff Association.

THE AEROSPACE CORPORATION

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the